

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

|                                |   |                            |
|--------------------------------|---|----------------------------|
| <b>ROBERT S. BOIT, et al.,</b> | ) |                            |
|                                | ) |                            |
| <b>Plaintiff</b>               | ) |                            |
|                                | ) |                            |
| <b>v.</b>                      | ) | <b>Civil No. 91-0014 B</b> |
|                                | ) |                            |
| <b>GAR-TEC PRODUCTS, INC.,</b> | ) |                            |
|                                | ) |                            |
| <b>Defendant</b>               | ) |                            |

**RECOMMENDED DECISION ON MOTION TO DISMISS**

Defendant Gar-Tec Products, Inc. moves to dismiss this diversity action for lack of personal jurisdiction. This suit arises from alleged property damage to the plaintiffs' home, which is located in Penobscot, Maine, when it caught fire after a hot air gun was used to strip paint from its exterior clapboards. *See* Complaint && 1, 4 (Exh. B to Notice of Removal).

The defendant assertedly sells the hot air gun model at issue in this case, *id.* & 3, and presumably sold such hot air guns to Brookstone, a tool retailer with headquarters in New Hampshire, *see* Plaintiff's Objection to Defendant's Motion to Dismiss at 1-2, 5. The plaintiffs claim that the hot air gun used here was purchased through the mail from Brookstone and shipped by it into Maine. *Id.* at 1, 5.

The exercise of personal jurisdiction is governed by Maine's long-arm statute, 14 M.R.S.A. ' 704-A, which permits personal jurisdiction over nonresidents to the full extent allowed by the due

process clause of the Fourteenth Amendment.<sup>1</sup> See, e.g., *Caluri v. Rypkema*, 570 A.2d 830, 831 (Me.), *cert. denied*, 111 S. Ct. 62 (1990). To meet due process requirements, a defendant must have minimum contacts with the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). Such contacts "must come about by *an action of the defendant purposefully directed toward the forum State.*" *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1987) (citations omitted) (emphasis in original). "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Burger King*, 471 U.S. at 476 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

The burden is on the plaintiff to prove facts necessary to sustain jurisdiction. *Dalmau Rodriguez v. Hughes Aircraft Co.*, 781 F.2d 9, 10 (1st Cir. 1986). The court may weigh affidavits and other relevant materials to assist it in finding jurisdictional facts. 5A C. Wright & A. Miller, *Federal Practice and Procedure* 1351 at 253-56 (1990). At the pretrial stage, the plaintiff need only make out a *prima facie* showing. *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 655 F. Supp. 513, 533-34 (D. Me.), *aff'd in part, rev'd in part on other grounds*, 832 F.2d 214 (1st Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

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<sup>1</sup> The statute provides, *inter alia*, that a person, whether or not a citizen or resident of Maine, who "[m]aintain[s] any . . . relation to . . . persons . . . which affords a basis for the exercise of jurisdiction by the courts of [Maine] consistent with the Constitution of the United States," submits himself to the jurisdiction of Maine courts. 14 M.R.S.A. § 704-A(2).

The affidavits submitted by the parties establish the following facts. The defendant is an Indiana corporation with a principal place of business in Lowell, Indiana. Affidavit of Judith A. Duran ("Duran Affidavit") & 3. It is a wholesaler and importer of power tools and products. *Id.* It has never conducted or transacted business or sales in Maine, *id.* & 4, owned or operated any wholesale or retail sales outlets in Maine, *id.* & 5, advertised in Maine, *id.* & 6, employed any persons within Maine, *id.* & 7, or owned any real estate or other property in Maine, *id.* & 8. The defendant did not manufacture the hot air gun at issue in this case. *Id.* & 11.

The affidavit submitted by the plaintiffs states that Brookstone has a single retail outlet in Maine, although it has some 96 stores nationwide. Affidavit of Gail Fisk Malone ("Malone Affidavit") && 3, 5 and Exh. A thereto. It also conducts a mail order business from New Hampshire, *id.* at Exh. A, and mails its catalogue to at least one individual in Maine, *id.* at & 4.

Based on these facts, I cannot find the requisite minimum contacts necessary to sustain personal jurisdiction over the defendant. Despite the plaintiffs' allegations, the motion record does not contain any information of evidentiary quality establishing that the defendant sold and distributed the hot air gun at issue to Brookstone or that the gun was purchased from Brookstone by mail and shipped by it into Maine. Jurisdiction clearly cannot be found based on the fact that Brookstone has an outlet in Maine. The issue is whether the defendant, not Brookstone, has contacts with Maine. The plaintiffs have failed to meet their burden of proving facts necessary to sustain personal jurisdiction.<sup>2</sup>

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<sup>2</sup> In the absence of proof of any contacts, no analysis need or can be made as to the sufficiency of

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contacts and whether they comport with ``traditional conceptions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). *See also* *Burger King*, 471 U.S. at 475-76; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

For the foregoing reasons, I recommend that the defendant's motion to dismiss for lack of personal jurisdiction be **GRANTED**.

**NOTICE**

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

***Dated at Portland, Maine this 6th day of August, 1991.***

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***David M. Cohen***  
***United States Magistrate Judge***